

Students

Amendments to Senate Bill No. 187  
1st Reading Copy

Requested by Senator Jim Shockley

For the Senate Judiciary Committee

Prepared by Valencia Lane  
January 25, 2011 (12:52pm)

1. Title, line 8.

Following: "SECTIONS"

Insert: "2-15-1028, 46-8-101,"

Following: "47-1-202,"

Strike: "AND"

Following: "47-1-215,"

Insert: "AND 47-1-216,"

2. Page 1, line 12.

Following: line 11

Insert: "Section 1. Section 2-15-1028, MCA, is amended to read:  
"2-15-1028. Public defender commission. (1) There is a  
public defender commission.

(2) The commission consists of ~~11~~ 5 members who must be  
attorneys and must be appointed by the governor as follows:

~~(a) two attorneys from nominees submitted by the supreme  
court;~~

~~(b) three attorneys from nominees submitted by the  
president of the state bar of Montana, as follows:~~

~~(i) one attorney experienced in the defense of felonies who  
has served a minimum of 1 year as a full-time public defender;~~

~~(ii) one attorney experienced in the defense of juvenile  
delinquency and abuse and neglect cases involving the federal  
Indian Child Welfare Act; and~~

~~(iii) one attorney who represents criminal defense lawyers;~~

~~(c) two members of the general public who are not attorneys  
or judges, active or retired, as follows:~~

~~(i) one member from nominees submitted by the president of  
the senate; and~~

~~(ii) one member from nominees submitted by the speaker of  
the house;~~

~~(d) one person who is a member of an organization that  
advocates on behalf of indigent persons;~~

~~(e) one person who is a member of an organization that  
advocates on behalf of a racial minority population in Montana;~~

~~(f) one person who is a member of an organization that  
advocates on behalf of people with mental illness and  
developmental disabilities; and~~

~~(g) one person who is employed by an organization that  
provides addictive behavior counseling~~

(a) one by the majority leader of the senate;  
(b) one by the minority leader of the senate;  
(c) one by the majority leader of the house of  
representatives;

(d) one by the minority leader of the house of  
representatives; and

(e) one by the chief justice of the supreme court.

(3) A person appointed to the commission must have significant experience in the defense of criminal or other cases subject to the provisions of Title 47, chapter 1, or must have demonstrated a strong commitment to quality representation of indigent defendants.

(4) A vacancy on the commission must be filled ~~in the same manner as the original appointment by a majority vote of the remaining members~~ and in a timely manner.

(5) Members shall serve staggered 3-year terms.

(6) The commission is allocated to the department of administration for administrative purposes only, as provided in 2-15-121, except that:

(a) the commission and chief public defender shall hire their own staff, except for any support staff provided by the department of administration for centralized services, such as payroll, human resources, accounting, information technology, or other services determined by the commission and the department to be more efficiently provided by the department; and

(b) commission and office of state public defender budget requests prepared and presented to the legislature and the governor in accordance with 17-7-111 must be prepared and presented independently of the department of administration. However, nothing in this subsection (6)(b) prohibits the department from providing administrative support for the budgeting process and including the budget requests in appropriate sections of the department's budget requests for administratively attached agencies.

(7) While serving a term on the commission, a member of the commission may not serve as a judge, a public defender employed by or under contract with the office of state public defender established in 47-1-201, a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official.

(8) Members of the commission may not receive a salary for service on the commission but must be reimbursed for expenses, as provided in 2-18-501 through 2-18-503, while actually engaged in the discharge of official duties.

(9) The commission shall establish procedures for the conduct of its affairs and elect a presiding officer from among its members."

{ Internal References to 2-15-1028:  
ok 47-1-103 }

**Insert:** "Section 2. Section 46-8-101, MCA, is amended to read:

"46-8-101. **Right to counsel.** (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel and must be asked if the aid of counsel is desired.

(2) If Except as provided in subsection (3), if the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a felony or the offense is a misdemeanor and incarceration is a sentencing option if the defendant is convicted, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel to represent the defendant without unnecessary delay pending a determination of eligibility under the provisions of 47-1-111.

(3) Before a public defender is appointed in a misdemeanor case, the court may waive incarceration as a sentencing option, and if incarceration is waived, a public defender may not be assigned."

{Internal References to 46-8-101:

ok 46-7-102 ok 47-1-104 }"

**Renumber:** subsequent sections

3. Page 1, line 18.

**Strike:** "\$150"

**Insert:** "attorney fees at the rate of \$60 an hour"

4. Page 1, line 19.

**Strike:** "\$75"

**Insert:** "\$60"

**Following:** "hour"

**Strike:** "up to a maximum of \$5,000"

5. Page 1, line 21.

**Following:** "trial"

**Insert:** "or a justice's court trial"

6. Page 1, line 24.

**Following:** "statement."

**Insert:** "The defendant is also responsible for the cost of counsel and expenses incurred in preparing for or completing an appeal."

7. Page 2, line 3.

**Following:** line 2

**Insert:** "(5) Costs of counsel imposed under this section must be included in the court's judgment.

(6) (a) In addition to other methods of payment, the court may order forfeiture and sale of the offender's assets under the provisions of Title 25, chapter 13, part 7, unless the court

finds, after notice and an opportunity for the offender to be heard, that the assets are reasonably necessary for the offender to sustain a living or support the offender's dependents or unless the state determines that the cost of forfeiture and sale would outweigh the amount available to the office of the state public defender after sale. If the proceeds of sale exceed the amount of payment ordered and the costs of forfeiture and sale, any remaining amount must be returned to the offender.

(b) After a prosecution is commenced and upon petition of the prosecutor, the court may grant a restraining order or injunction, require a satisfactory bond, or take other action if the court finds that the restraining order or injunction, bond, or other action is necessary to preserve property or assets that could be used to satisfy an anticipated payment obligation. A hearing must be held on the petition, and any person with an interest in the property is entitled to be heard.

(7) For a felony offense:

(a) during any period that the offender is incarcerated, the department of corrections shall take a percentage, as set by department rule, of any money in any account of the defendant administered by the department and use the money to satisfy any existing payment obligation to the office of the state public defender;

(b) at the beginning of any period during which the offender is not incarcerated, the offender shall sign a statement allowing any employer of the offender to garnish up to 25% of the offender's compensation and give the garnished amounts to the department of corrections to be used by the department to satisfy any existing payment obligation; and

(c) during any period that the defendant is on probation or parole, the probation and parole officer shall set a monthly payment amount by dividing the total amount of unpaid payment obligation by the number of remaining months of probation or parole. The probation and parole officer may adjust the monthly payment up or down by a maximum of 10%, depending on the offender's circumstances.

(8) The department of corrections shall give the department of revenue a copy of the order to make payments to the office of the state public defender. If full payment has not been made, the department of revenue shall intercept any state tax refunds and any federal tax refunds, as provided by law, due the offender and transfer the money to the department of corrections for a felony offense and to the sentencing court for a misdemeanor offense for disbursement to the office of the state public defender. The department of revenue may charge the department of corrections a fee to recover its costs of intercepting a tax refund. The fee may not exceed the amount charged a state agency for debt collection services under Title 17, chapter 4.

(9) As provided in 46-18-201, a sentencing court shall, as part of the sentence, require an offender to fully compensate the

office of state public defender for the costs of counsel. The duty to pay the costs of counsel under the sentence remains with the offender or the offender's estate until full payment is made, whether or not the offender is under state supervision. If the offender is under state supervision, payment of costs of counsel is a condition of any probation or parole.

(10) (a) The offender shall pay the cost of supervising the payment of costs of counsel by paying an amount equal to 10% of the costs of counsel, but not less than \$5.

(b) A felony offender shall pay the restitution and cost of supervising the payment of costs of counsel to the department of corrections until the offender has fully paid the costs of counsel and the cost of supervising the payment of costs of counsel. The department shall pay the costs of counsel to the office of state public defender. The department may contract with a government agency or private entity for the collection of the payments for costs of counsel and the cost of collecting the payments for costs of counsel during the period following state supervision or state custody of the offender. The department shall adopt rules to implement this subsection (10) (b).

(c) In a misdemeanor case, payment of costs of counsel and of the cost of supervising the payment of costs of counsel must be made to the court until the offender has fully paid the costs of counsel and the cost of supervising the payment of costs of counsel. The court shall disburse the money to the entity employing the person ordered to supervise costs of counsel, which shall disburse the costs of counsel to the office of state public defender.

(11) If at any time the court finds that, because of circumstances beyond the offender's control, the offender is not able to pay the costs of counsel, the court may order the offender to perform community service during the time that the offender is unable to pay. The offender must be given a credit against costs of counsel due at the rate of the hours of community service times the state minimum wage in effect at the time that the community service is performed."

8. Page 3, line 12 through line 14.

**Strike:** subsection (5) in its entirety

**Insert:** "(5) establish and oversee a conflicts office with a conflicts manager responsible for conflicts of interest and for ensuring that cases involving a conflict of interest are handled according to professional ethical standards;"

9. Page 4, line 4.

**Following:** "type"

**Insert:** ", except for the offices of chief public defender and deputy public defender"

10. Page 4, line 24.

**Following:** "commission."

**Insert:** "The affidavit must clearly state that it is signed under the penalty of perjury and that a false statement may be prosecuted."

(c) Any defendant claiming indigency who is charged with a misdemeanor or felony shall file with the court an affidavit verified by a notary and file a copy of that affidavit with the prosecuting entity. The affidavit must contain the factual information required in this section and by the commission."

**Renumber:** subsequent subsections

11. Page 5, line 27.

**Strike:** subsection (a) in its entirety

12. Page 5, line 28.

**Strike:** "(b)"

**Insert:** "(a)"

13. Page 5, line 30.

**Strike:** "(c)"

**Insert:** "(b)"

14. Page 6, line 2 through line 4.

**Strike:** subsection (d) in its entirety

15. Page 6, line 5.

**Strike:** "(e)"

**Insert:** "(c)"

16. Page 6, line 8.

**Strike:** "(f)"

**Insert:** "(d)"

17. Page 6, line 9.

**Strike:** "(g)"

**Insert:** "(e)"

18. Page 6, line 13.

**Strike:** "(h)"

**Insert:** "(f)"

19. Page 6, line 15.

**Strike:** "(i)"

**Insert:** "(g)"

20. Page 6, line 17.

**Strike:** "(j)"

**Insert:** "(h)"

21. Page 6, line 23.

**Strike:** "(k)"

**Insert:** "(i)"

22. Page 6, line 25.

**Strike:** "(l)"

**Insert:** "(j)"

23. Page 7, line 16.

**Following:** "region;"

**Insert:** "and"

24. Page 7, line 17 through line 18.

**Strike:** subsection (h) in its entirety

25. Page 7, line 19.

**Strike:** "(i)"

**Insert:** "(h)"

26. Page 7, line 22.

**Following:** line 21

**Insert:** "Section 9. Section 47-1-216, MCA, is amended to read:

"47-1-216. **Contracted services -- rules.** (1) The commission shall establish standards for a statewide contracted services program that ensures that contracting for public defender services is done fairly and consistently statewide and within each public defender region.

(2) The chief contract manager shall oversee the contracting program and may not maintain a client caseload.

~~(2)~~(3) Beginning July 1, 2006, the state office and each regional office, in a manner consistent with statewide standards adopted by the commission pursuant to this section, may contract to provide public defender, professional nonattorney, and other personal services necessary to deliver public defender services within each public defender region. All contracting pursuant to this section is exempt from the Montana Procurement Act, as provided in 18-4-132.

~~(3)~~(4) Contracts may not be awarded based solely on the lowest bid or provide compensation to contractors based solely on a fixed fee paid irrespective of the number of cases assigned.

~~(4)~~(5) Contracting for public defender services must be done through a competitive process that must, at a minimum, involve the following considerations:

(a) attorney qualifications necessary to provide effective assistance of counsel that meets the standards established by the commission;

(b) attorney qualifications necessary to provide effective assistance of counsel that meet the standards issued by the Montana supreme court for counsel for indigent persons in capital cases;

(c) attorney access to support services, such as paralegal

and investigator services;

(d) attorney caseload, including the amount of private practice engaged in outside the contract;

(e) reporting protocols and caseload monitoring processes;

(f) a process for the supervision and evaluation of performance;

(g) a process for conflict resolution; and

(h) continuing education requirements in accordance with standards set by the commission.

~~(5)~~(6) The chief public defender and deputy public defenders shall provide for contract oversight and enforcement to ensure compliance with established standards.

~~(6)~~(7) The commission shall adopt rules to establish reasonable compensation for attorneys contracted to provide public defender services and for others contracted to provide nonattorney services.

(8) Contract attorneys may not take any money or benefit from an appointed client or from anyone for the benefit of the appointed client.

(9) The commission shall limit the number of contract attorneys so that all contracted attorneys may be meaningfully evaluated.

(10) The commission shall implement rules requiring evaluation of every contract attorney on an annual basis by the chief contract manager based on written evaluation criteria."

{ Internal References to 47-1-216:

ok 18-4-132      ok 47-1-104      ok 47-1-205      ok 47-1-215 }"

**Insert:**    "NEW SECTION. Section 10. Conflicts of interest. (1)  
The commission shall establish a conflicts office to contract for attorneys to represent indigent defendants in circumstances where, because of conflict of interest, the public defender program is unable to provide representation to a defendant.

(2) The commission shall appoint a conflicts manager to oversee the office. The conflicts manager reports directly to the commission and not to the chief public defender. The conflicts manager may not handle cases.

(3) All attorneys contracted for conflict of interest cases shall report to the conflicts manager."

- END -